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No. 80-1365

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT, PETITIONER

v.

MOHEGAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Nonintercourse Acts, now codified in 25 U.S.C. 177, which, since 1790, have prohibited the conveyance of land held by an Indian tribe without the approval of the United States, applied to land occupied by an Indian tribe in Connecticut.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of March 30, 1981.

STATEMENT

This action was filed on August 31, 1977, by respondent, identified as the "Mohegan Tribe of Indians," to obtain possession of approximately 600 acres of State-owned land in the Town of Montville, Connecticut. Respondent contends that this land was unlawfully acquired from the Mohegan Tribe without the approval of the United States (Complaint, ¶¶ 1, 6, 6(h)). The Mohegan Tribe of Indians lived in eastern Connecticut in colonial times and had contacts with white settlers as early as the 1660's. See generally 15 *Handbook of North American Indians* 172-173, 181-182 (Smithsonian Institution 1978). This litigation apparently was brought at the direction of one John E. Hamilton, who is alleged to be the Grand Sachem of the Tribe for his lifetime and, in that capacity, to have primary if not sole authority to manage the Tribe's affairs, "assertions of non-Mohegan

Indians and others to the contrary notwithstanding" (Complaint, ¶ 8).[1]

Respondent's claim rests in part on provisions in the various Trade and Intercourse Acts adopted by Congress beginning in 1790. Temporary versions of those Acts were passed in 1790, 1793, 1796 and 1799.[2] In 1802, Congress enacted a "permanent" Trade and Intercourse Act (Act of Mar. 30, 1802, ch. 13, 2 Stat. 139), and in 1834, Congress enacted a revised and expanded Trade and Intercourse Act (Act of June 30, 1834, ch. 161, 4 Stat. 729). Each of these Acts included a section, commonly called the "Nonintercourse Act" (see *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1974)), that prohibited the transfer of Indian land without the permission of the United States.[3]

The complaint alleges that the 600 acres claimed were owned by the Mohegan Tribe from time immemorial and in 1790, when the first Nonintercourse Act was enacted, but that the land subsequently passed out of the Tribe's

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[1] Paragraph 8 of the complaint states in full:

> 8. Plaintiff Mohegan Tribe of Indians (hereinafter the "Tribe") is an Indian Tribe which has resided in the State of Connecticut since time immemorial. Its Grand Sachem for his lifetime, is John E. Hamilton, now of Waterford, New London County, Connecticut; and the assertions of non-Mohegan Indians and others to the contrary notwithstanding, plaintiffs' [sic] affairs are lawfully managed only by the said Grand Sachem and such tribal authority as he and tribal custom have established long prior to the present decade.

As we explain below (see pages 11-12, *infra*), there appears to be some question whether the Mohegan Tribe continues to exist as an entity that may invoke the prohibitions against alienation of Indian land without federal approval.

[2] See note 3, *infra*.

[3] Act of July 22, 1790, ch. 33, Section 4, 1 Stat. 138 (Pet. App. 54a); Act of Mar. 1, 1793, ch. 19, Section 8, 1 Stat. 330 (Pet. App. 58a-59a); Act of May 19, 1796, ch. 30, Section 12, 1 Stat. 472 (Pet. App. 66a-67a); Act of Mar. 3, 1799, ch. 46, Section 12, 1 Stat. 746 (Pet. App. 72a); Act of Mar. 30, 1802, ch. 13, Section 12, 2 Stat. 143 (Pet. App. 77a); Act of June 30, 1834, ch. 161, Section 12, 4 Stat. 730 (Pet. App. 82a).

ownership without the approval of the United States required by the Constitution and the Nonintercourse Acts, now codified at 25 U.S.C. 177 (Complaint, ¶¶ 3, 12, 19-21).[4] As relief, respondent seeks a declaration that it has the right to possession of the 600 acres and that the State's title to the land is void; an order restoring possession of the land to respondent and granting respondent rents and profits from the land; and such other relief as the court deems just (Complaint, at 10-11).[5]

In its answer, the State denies most of the factual allegations in the complaint, including the claim that ownership of the subject land was transferred to the State without the required consent of the United States (Answer, ¶ 4 (denying the allegations in Complaint, ¶ 20)). In addition, as an affirmative defense, the State submits that respondent lacks standing "to assert the purported rights of an alleged Mohegan Tribe of Indians" and that respondent's claim "is barred by the federal common law defense of laches" (Answer, ¶¶ 6, 7).

On November 14, 1978, the State filed a motion to dismiss the complaint for failure to state a claim under 25 U.S.C. 177. The substance of the argument was that none of the restraints on alienation contained in the Nonintercourse Acts applied to Indian lands in the State of Connecticut but, instead, were intended to reach only Indian tribes on the frontier. The district court denied the motion to dismiss (Pet. App. 30a-52a). The court

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[4] The precise dates when the land passed from ownership of the Tribe are not set out in the complaint, although apparently the transfers took place after 1860. Paragraph 18 of the complaint alleges that the lands sequestered for the Tribe consisted of approximately 2100 acres, according to a state survey conducted in 1860, and that "[t]he defendant State purported also now to allot, re-allot and/or confirm much of this acreage to the several Indians of the Tribe." Paragraph 19 then alleges that through various mesne conveyances, the acreage involved came into record ownership of the State.

[5] Paragraph 7 of the complaint states that respondent might also initiate similar actions against other landowners and that the total amount of land involved would approximate 2550 acres.

ruled that the Nonintercourse Acts applied to the transfer of Indian tribal lands throughout the United States.

The district court subsequently certified the statutory question for interlocutory appeal, pursuant to 28 U.S.C. 1292(b) (Pet. App. 3a). The court of appeals affirmed (Pet. App. 1a-29a), concluding that the restraints on alienation of Indian land contained in the Nonintercourse Acts applied throughout the United States. The court of appeals also rejected the State's argument based on language in the various Trade and Intercourse Acts exempting from the statutory restraints "any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states" (Section 19 of the 1802 Act, 2 Stat. 145). In the court's view, this exception did not encompass land sales, but was limited to ordinary commercial transactions which might be carried on between Indians and surrounding non-Indian communities (Pet. App. 26a-29a).

ARGUMENT

The decision of the court of appeals that the statutory restraints on alienation of Indian land without the consent of the United States applied in the original 13 states is correct and does not conflict with the decision of any other court of appeals. Moreover, although perhaps interesting as a matter of historical and intellectual debate, the continuing importance of the issue is very doubtful. And, in any event, the present case, still at an interlocutory, indeed very preliminary, stage, is an inappropriate vehicle for resolving the question. In the circumstances, we urge the Court to decline review.

1. One reason to doubt the recurring importance of the statutory question decided below is that the validity of Indian land sales, like those challenged here and in similar cases, most probably does not depend upon the coverage of the Nonintercourse Acts. To be sure, the amenability of the purchaser to criminal penalties turns on those Acts. But, quite independently of any statutory

restraint, Indian tribes have long been held disabled from alienating their lands without the concurrence of the national sovereign, and any such attempted transaction is accordingly void as a matter of law, without reference to the Nonintercourse Acts. Thus, in this case, the respondent pleaded the ineffectiveness of any land sales under the Constitution, and no decision here of the statutory issue can affect that fundamental objection, not yet addressed by the courts below. And the same principle presumably will govern any other like possessory land claims.

The principle that an Indian tribe's right to occupy aboriginal lands—its Indian title—cannot be extinguished without the approval of the federal government antedates the statutory restraints on alienation contained in the Nonintercourse Acts and now codified in 25 U.S.C. 177. The exclusive authority of the federal government to extinguish Indian title is rooted in the Constitution itself and in the necessary attributes of sovereignty that passed to the federal government upon formation of the Union and adoption of the Constitution. The Court reaffirmed this rule most recently in *Oneida Indian Nation* v. *County of Oneida*, *supra*, 414 U.S. at 667-668 (footnote omitted):

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. * * *

> The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

See also *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345-346 (1941); *United States* v. *Kagama*, 118 U.S. 375, 381 (1886); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832); *id.* at 584 (McLean, J.); *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823);[6] cf. *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978).

Moreover, the Court held in *Oneida* that "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13" (414 U.S. at 670), even though fee title to land in the original states and the preemptive right to purchase land from the Indians was in the states (*ibid.*). Accordingly, quite aside from the restraints in the Nonintercourse Acts, Indian title to land in the original 13 states could not be extinguished without the consent of the

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[6] In *Johnson* v. *McIntosh*, the Court refused to recognize land titles originating in grants by Indians to private parties in 1773 and 1775 because those grants were contrary to the accepted principle that Indian title could be extinguished only with the consent of the general government. See *Oneida*, *supra*, 414 U.S. at 669. These grants predated the passage of the first Nonintercourse Act in 1790 and, indeed, the formation of the Union. Significantly, the Court rejected the argument that acts of several colonial assemblies prohibiting purchases from the Indians indicated that Indian deeds would be valid in the absence of such statutory prohibitions. To the contrary, the Court concluded that "the fact that such acts have been generally passed, is strong evidence of the general opinion, that such purchases are opposed by the soundest principles of wisdom and national policy" (21 U.S. (8 Wheat.) at 604). By the same token, the enactment by Congress of restraints on alienation in the first and subsequent Nonintercourse Acts merely confirms the exclusive authority to extinguish Indian title that resides in the federal sovereign.

federal government. Respondent Mohegan Tribe invokes this principle in the present case: its claim to possession of the 600 acres in suit is based not only on 25 U.S.C. 177, but also on "prohibitions against alienation or extinction of Indian title or right of occupancy except with [the] concurrence of the United States, as encompassed within the provisions of Article I, § 8 of the Constitution of the United States" (Complaint, ¶ 3).[7]

Therefore, even if this Court were to grant the State's petition and conclude that the Nonintercourse Acts did not apply to transfers of the 600 acres in suit, respondent's claim that the alienation of that land nevertheless violated the constitutionally based rule would remain to be decided in the courts below. Because a decision in the State's favor therefore would not finally dipose of respondent's claim to possession of the land—or any like claim by other eastern tribes—the Court should deny review on the statutory issue at this interlocutory stage.

2. It is equally relevant to stress the very limited prospects of substantial further litigation that might be affected by the Court's decision in this case, even assuming the only issue now presented for review were dispositive. Contrary to the State's contention, there are very few unresolved cases involving Indian land claims in the eastern states, and there is, moreover, good reason to

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[7] The reference in the complaint to Article I, Section 8, of the Constitution apparently is to Clause 3 of that Section, the Commerce Clause, which gives Congress power to regulate commerce "with the Indian Tribes." The Commerce Clause is not, of course, the sole source of federal authority in this area. For example, the Treaty Clause (Article II, Section 2, Clause 2), and the dependent status of the Indians (*United States* v. *Kagama*, *supra*, 118 U.S. at 383-384; *United States* v. *Wheeler*, *supra*, 435 U.S. at 326) are additional sources of such authority. Accordingly, although the federal government's exclusive authority to extinguish Indian title finds ample support in the Commerce Clause, *Oneida* establishes that this authority flows as well from the nature of the sovereign's relation to Indians occupying aboriginal lands within the United States.

anticipate legislative solutions of the few outstanding controversies.

The largest of the eastern claims—those of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians in Maine—were settled by comprehensive legislation enacted by Congress last October. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 *et seq.* Similar legislation enacted in 1978 extinguished all aboriginal claims in Rhode Island. Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, Section 13, 92 Stat. 817, 25 U.S.C. (Supp. III) 1712. See also Act of Nov. 24, 1980, Pub. L. No. 96-484, 94 Stat. 2365 (approving a settlement of an aboriginal claim by the Pamunkey Indian Tribe of Virginia). The other major eastern land claims are those of the Oneida Nation and other Iroquois groups in New York. But petitioner concedes (Pet. 24) that the lands in question there were within "Indian country" as petitioner uses that term and, therefore, that the New York claims would not be affected by a decision in favor of the State of Connecticut in this case. See also *The New York Indians*, 72 U.S. (5 Wall.) 761, 771 (1867); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527 (N.D. N.Y. 1977), on remand from 414 U.S. 661 (1974). Still other eastern land claims have been unsuccessful in court because of the failure of the plaintiff to establish its tribal status. *Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979); *Mashpee Tribe* v. *New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977), aff'd, 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979).

The remaining eastern claims cited by petitioner (Pet. 4) and amici State of South Carolina, *et al.* (Br. 5-7),[8]

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[8] We are not aware of other pending cases in the east, aside from those cited, that would be affected by Connecticut's argument here that lands east of the frontier were not covered by the Nonintercourse Acts. Amici State of South Carolina, *et al.*, cite (Br. 6, n.15) figures furnished by the Department of the Interior and printed in a committee report on the bill extending the statute of limitations in 28 U.S.C. 2415(a) for the United States to bring damage actions on behalf of Indian tribes. The Department reported that

are two relatively small claims in Connecticut and one in Massachusetts,[9] and claims by the Seminole Nation in Florida[10] and the Catawba Tribe in South Carolina.[11] We have been informed by counsel for the tribes in the two Connecticut cases and the Massachusetts case that negotiations are now underway with affected landowners to settle those claims. Similarly, we have been informed by the Department of the Interior that settlement discussions have taken place regarding the Florida claims and that a discussion draft settlement proposal has been prepared. A bill, H.R. 3274 (96th Cong., 1st Sess. (1979)), was introduced in the 96th Congress to settle the South Carolina claims, and hearings were held on that bill in the summer of 1979. Subsequently, in July 1980, a state legislative task force prepared a settlement proposal to be implemented by state and federal legislation. Although settlement discussions based on this proposal subsequently were broken off and the Catawba Tribe filed suit in October of last year seeking possession of 140,000 acres of land, there is no reason to believe that settlement of this claim has been effectively foreclosed by any of the parties.

Voluntary settlement by the federal government, the tribes, the states, and affected landowners surely is a desirable way to resolve these claims. This process is

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it was processing some 9768 Indian claims and that more than 5000 additional claims remained to be inventoried. S. Rep. No. 96-569, 96th Cong., 2d Sess. 8 (1980). We have been informed by the Department of the Interior that the vast majority of these claims are by individual Indians, mostly allottees of lands in the west, and therefore do not raise issues similar to those involved in tribal aboriginal claims in the east.

[9] *Western Pequot Tribe of Indians* v. *Holdridge Enterprises, Inc.*, Civil No. H-76-193 (D. Conn., filed Mar. 27, 1977); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Wampanoag Tribe of Gay Head* v. *Town of Gay Head*, Civil No. 74-5826-G (D. Mass., filed Nov. 28, 1974).

[10] *Seminole Indians of Florida* v. *State of Florida*, Case No. 78-6116-Civ.-N.R. (S.D. Fla.).

[11] *Catawba Tribe of South Carolina* v. *State of South Carolina*, Civil Action No. 80-2050-6 (D. S.C., filed Oct. 28, 1980).

subject to the oversight of the political branches of the federal government, which are in a position to weigh the equities of the parties from a broad historical—and political—perspective. Those branches, too, may approve accommodations among competing interests based on relative hardships, perceived injustices, and other factors that a court might not be able to consider if it were to confine its focus only to a tribe's bare legal claim to possession based on the Nonintercourse Acts or unextinguished aboriginal title. The settlement process in the various states has not been without certain disagreements, as could be expected in any negotiations. But the results reached thus far demonstrate that the process is effective and that it is reasonable to anticipate further progress to resolve all of the eastern claims.

Congress has, moreover, demonstrated that it is fully prepared to enact appropriate settlement legislation extinguishing aboriginal claims to eastern land when the parties involved come into agreement, and Congress could, of course, extinguish aboriginal claims unilaterally if negotiations were not fruitful and circumstances so required. Thus, there is little possibility of a significant disruption of the pattern of private land ownership in areas subject to aboriginal claims. Accordingly, review by this Court is not necessary in order to resolve the various eastern land claims.

3. The instant petition also does not present an appropriate vehicle for review of the scope of the Nonintercourse Acts and the validity of eastern Indian land claims. On the one hand, as we have pointed out above, even if the issue of statutory interpretation were decided in the State's favor, there would remain to be resolved respondent's claim that federal consent is required for the extinguishment of Indian title independently of the Nonintercourse Acts. On the other hand, because the case is at the most preliminary of stages, respondent ultimately may be unable to prove its case on the merits.

The record contains nothing beyond the allegations in paragraphs 12-19 of the complaint to establish that the 600 acres in suit were in fact part of the Mohegan Tribe's

aboriginal homeland. And the record does not even contain any allegations, much less findings, regarding how the 600 acres came to be held by the State or the degree, if any, of federal involvement or acquiescence in the conveyances. It is also likely that the State would seek to establish at trial that aboriginal title to the lands in question was effectively extinguished by various actions taken by Connecticut before the exclusive authority to extinguish Indian title to this land passed to the federal government. Thus, the Court is called upon to interpret the different Nonintercourse Acts in a virtual factual vacuum.

In addition, the lower courts have held that one of the elements of a prima facie case under 25 U.S.C. 177 is a showing that the plaintiff "is or represents an Indian 'tribe' within the meaning of the Act" (*Epps* v. *Andrus*, *supra*, 611 F.2d at 917, quoting *Oneida Indian Nation* v. *County of Oneida*, *supra*, 434 F. Supp. at 537, and *Mashpee Tribe* v. *New Seabury Corp.*, *supra*, 427 F. Supp. at 902). In the present case, there appears to be some doubt about the current status of the Mohegan Tribe and the standing of respondent to bring the instant action as, or on behalf of, that Tribe. In paragraph 6 of its answer, the State contends that respondent does not have standing "to assert the purported rights of an alleged Mohegan Tribe of Indians."

Although we express no view on the current status of the Tribe at this stage of the litigation, the Department of the Interior informs us that it has not acknowledged that the Mohegan Tribe now constitutes an Indian tribe as a distinct racial or cultural entity and that it therefore has not acknowledged any federal trust relationship with an entity known as the Mohegan Tribe.[12] The Department of

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[12] This case therefore differs from *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975), where it was stipulated that the Passamaquoddy Tribe in Maine was a "tribe" racially and culturally. *Id.* at 376-377. The court of appeals in that case merely rejected the argument that land transactions by a group conceded to be an Indian tribe are not covered by 25 U.S.C. 177 unless the tribe is formally "recognized" by the federal government. 528 F.2d at 377-379.

the Interior has promulgated regulations establishing procedures and standards under which Indian organizations may be acknowledged as Indian tribal entities. 25 C.F.R. Part 54. Pursuant to these regulations, an entity identified as the "Mohegan Indian Group," through Mr. John E. Hamilton (see Complaint, ¶ 8, quoted at note 1, *supra*), is among the dozens of groups that have petitioned for acknowledgment of tribal status under these regulations. See 44 Fed. Reg. 116 (1979). We have been informed that despite the Department's request (*ibid.*), the Mohegan group has not supplied any data to support its petition for tribal status, other than a letter from counsel, who is also counsel for respondent herein.[13] If respondent similarly fails to make a showing in the instant litigation of its current status as a tribe, its claim under 25 U.S.C. 177 will fail for this reason alone. See *Epps* v. *Andrus*, *supra*; *Mashpee Tribe* v. *New Seabury Corp.*, *supra*. In that case, there would of course be no occasion for this Court to consider whether the Nonintercourse Acts applied to the conveyances of the land involved.

4. In any event, the State's argument that the Nonintercourse Acts did not apply in Connecticut is incorrect. Before turning to the terms of the statutory provisions, however, there are two features in the background of the Acts that weigh strongly against limiting their geographic reach.

a. First, as we have explained, in *Oneida* (414 U.S. at 670) this Court held the "rudimentary proposition[]" that extinguishment of Indian title requires approval of the federal government applicable in the original 13 states, even though these states owned the fee to the lands or were possessed of the right of preemption. This uni-

[13] Paragraph 8 of the complaint, quoted in note 1, *supra*, also suggests that there is some question regarding the authority of Mr. Hamilton, the alleged Grand Sachem of the Tribe, to speak for the Tribe in these matters, even assuming that the Tribe continues to exist as a distinct entity. This issue likewise should be resolved by the district court before resolution of respondent's claim. If this case is not being pursued at the direction of an authorized representative of the Tribe, a decision on the merits presumably would not bind the Tribe.

form principle therefore controlled, upon formation of the Union, wherever Indian title had not been extinguished by the prior sovereign. Since the Nonintercourse Acts of 1790 and later years confirm and implement this rule, it is reasonable to expect that Congress would "assert[] the primacy of federal law" (*Oneida*, *supra*, 414 U.S. at 667) in the original 13 states to the same geographic extent, *i.e.*, wherever Indian title had not been extinguished by the prior sovereign, whether or not beyond the frontier.

Second, the circumstances surrounding adoption of the Indian Commerce Clause also weigh against limiting the geographic scope of the Nonintercourse Acts. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled shall * * * have the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated * * *." In contrast, the Commerce Clause broadly authorizes Congress "[t]o regulate Commerce * * * with the Indian Tribes." The limitations in the Articles of Confederation were deleted for the very purpose of removing any doubts about the supremacy of federal authority over Indians within the borders of the original states. As Madison explained in *The Federalist* No. 42, at 284 (J. Cooke ed. 1961):

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. * * * What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal Councils. And how trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

See also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.)

515, 558-559 (1832); *United States* v. *43 Gallons of Whiskey*, 93 U.S 188, 194 (1876). In light of this deliberate action of the Constitutional Convention removing obstacles to Congress' authority over Indian affairs within the boundaries of the original 13 states, it would have been quite surprising for Congress, in enacting the first significant implementing legislation, just three years later, to have wholly excluded from federal regulation any matters involving Indians who might be thought to have been "members" of the original 13 states or who might otherwise have been subject to the legislative jurisdiction of those states.

b. Certainly nothing in the language of the Nonintercourse Acts suggests that they were inapplicable to certain lands in the original 13 states, even though Indian title to those lands had not been extinguished. Section 4 of the 1790 Act provided that any sale of Indian land to any person "or to any state, whether having the right of preemption to such lands or not," shall not be valid. The right of preemption existed in the states with respect to land *within* their borders to which Indian title had not been extinguished. *Oneida*, *supra*, 414 U.S. at 670. Subsequent re-enactments of the first Nonintercourse Act are similarly expansive. Section 12 of the 1796, 1799, and 1802 Acts all provided that "*no* purchase, grant, lease or other conveyance of lands * * * from *any* * * * nation or tribe of Indians, within the bounds of the United States," shall be valid unless made by treaty or convention (emphasis added). With minor variations, these sections then provided criminal sanctions against treating "with *any* such Indian nation, or tribe of Indians, for the title or purchase of *any* lands by them held or claimed" (*ibid.*). The italicized words are hardly indicative of an intent to exclude some or all land held by Indians in the original states.

Moreover, all of the Nonintercourse Acts enacted after 1790 contained a proviso to the criminal sanction permitting the agents of a state who may be present at a treaty held with Indians under authority of the United States, with approval of the commissioner representing the

United States, "to propose to, and adjust with the Indians, the compensation to be made, *for their claims to lands within such state*, which shall be extinguished by the treaty" (*ibid.*). The proviso makes abundantly clear that lands "within" the states were covered by the reprohibition against alienation without federal approval.

The only changes made when the nonintercourse provision was reenacted in Section 12 of the 1834 Act was the deletion of the reference to nations or tribes "within the bounds of the United States." But this does not detract from the all-inclusive nature of the remaining portions of that or prior Nonintercourse Acts. More importantly, however, Section 29 of the 1834 Act, ch. 161, 4 Stat. 734, although it repeals the 1802 Act, provides that this repeal shall not "impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi." Thus, after enactment of the 1834 Act, lands held by tribes in Connecticut and other states east of the Mississippi continued to be subject to Section 12 of the 1802 Act, which expressly applied to *any* purchase of land from *any* Indian tribe "within the bounds of the United States" (emphasis added).

The State nonetheless argues (Pet. 5-25) that all of the provisions of the Trade and Intercourse Acts, including the prohibitions against Indian land transfers, applied only to what it terms "Indian country," meaning territory west of the "frontier" or, in later years, west of boundary lines established in treaties with certain Indian tribes. Thus, the State contends that even if the various Nonintercourse Acts applied to some of the territory of the original states, they applied only to those portions that were west of the "frontier" or treaty boundaries and were therefore in "Indian country," as the State uses the term.

Nothing in the text of any of the Nonintercourse Acts suggests a rule that the statutory requirement of federal approval for extinguishment of Indian title would apply in some parts of a state but not in others. But the State suggests (Pet. 5-6) that a purpose so to limit

the nonintercourse provisions may be inferred from language in a different section of the Trade and Intercourse Acts. It points out that the first section of the 1796, 1799, and 1802 Acts each described a boundary line established by treaty between the United States and various Indian tribes. Section 1 of each Act then provided that if that line should be varied by a later treaty, "then all the provisions contained in this act, shall be construed to apply to said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited." The State contends that the reference to "all the provisions" of the Act must mean that the nonintercourse provisions in Section 12 of each Act applied only west of the boundary so described.

The text of the proviso itself does not support the reading the State would give it. The proviso does *not* say that "all the provisions" of the Act shall be construed to apply only *west* of the boundary line; if Congress had intended such an important limitation, it surely would have said so directly. Rather, the proviso states only that the provisions of the Act shall apply "*to* said line" (emphasis added), and then only "in the same manner, as the said provisions now apply to the boundary line". In other words, those sections of the Act that stated a prohibition by specific reference *to* the boundary line would apply "in the same manner" if the line were later redrawn.[14] Other sections, such as the noninter-

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[14] See, *e.g.*, Section 2 of the 1796, 1799, and 1802 Acts, making it unlawful for a citizen or resident of the United States or its territories to "cross over, or go within the said boundary line, to hunt, or in any wise destroy the game" (1 Stat. 470, 744; 2 Stat. 141).

The State suggests (Pet. 6-7) that it would be "paradoxical" for Congress to have confined certain provisions of the Trade and Intercourse Acts to areas on the Indian side of the boundary line described in Section 1 of the Act, yet applied other provisions of the Act throughout the United States. However, we see no paradox in Congress' tailoring the application of each prohibition to the scope of the particular problem it was intended to address. For example, because of the likelihood that Indians might be taken advantage of in ordinary commercial dealings irrespective of where they might occur, it was reasonable that Congress should

course provisions in Sections 12 of the Acts, which did not refer to the boundary line, consequently would be unaffected by a subsequent shift of that line.[15] The court of appeals found this interpretation of the proviso to be "quite plain" when it is "read as a whole." (Pet. App. 16a).

In an effort to overcome the flaws in its argument based on the text of the Trade and Intercourse Acts, the State attempts to show (Pet. 8-13) that the purpose of those Acts was to preserve peace on the frontier and that all provisions of the Acts, including those banning land transfers, must therefore be limited in their application to Indians along the frontier. But the very title of the 1796 and subsequent Acts, upon which the State relies (Pet. 9-10), was "An Act to regulate Trade and Intercourse with the Indian Tribes, *and* to preserve Peace on the Frontiers" (emphasis added), thereby confirming that the purpose the State identifies was not all that Congress sought to accomplish. Moreover, as the court of appeals explained (Pet. App. 18a-19a),

> there is nothing inconsistent with these views [that a principal purpose of the Acts was to preserve peace on the frontier] in reading the Nonintercourse statute, as its language suggests, to include encroachment upon Indian lands throughout the United States. Such a promise may well have been thought

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proscribe throughout the United States the purchase from them of such essentials as guns or other articles used in hunting, instruments of husbandry, and cooking utensils. See Section 9 of the 1802 Act, 2 Stat. 142. The same rationale, and the independent requirement that the federal sovereign must consent to the extinguishment of Indian title, explains why Congress would apply the restraint on alienation of land throughout the United States.

[15] Of course, a westward shift of the boundary line pursuant to a treaty with an Indian tribe would often be coupled with an extinguishment of Indian title or claims to land in the ceded area. In these circumstances, the Nonintercourse Act in effect at the time would not subsequently have applied to the ceded land because a valid treaty would have extinguished Indian title to it in the very manner contemplated by the Nonintercourse Act itself. Accordingly, the shift of the boundary would have been an *effect*, not the *cause*, of the inapplicability of the Nonintercourse Act in the area.

> best to mollify the apprehensions of Indians on the frontier as well as those in the settled regions. Surely it would have furnished evidence to the Indians of the seriousness of the federal government's intention to regulate land sales, a matter of great concern to the Indians.

The statements of officials of the Executive Branch upon which the State relies (Pet. 13-18) for the proposition that the restraints on alienation of Indian land did not apply in Connecticut do not for the most part even concern the Trade and Intercourse Acts, much less their nonintercourse provisions. They therefore are of no relevance to the issue in this case.[16] The only two statements that do refer to the Trade and Intercourse Acts (Pet. 16-17) are merely general descriptions of the boundary line in the 1802 Act and do not concern the restraints on alienation in Section 12 of that Act.[17]

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[16] Thus, that President Washington decided against the use of federal funds to make Catholic priests available in Massachusetts because that State had provided care and protection for Indians there (see Pet. 14) has no bearing on whether Indian title can be extinguished without federal approval. The 1899 and 1931 letters from the Commissioners of Indian Affairs, cited by the State (Pet. 17-18 & n.19), are irrelevant for the same reason. Similarly, that Secretary of War Calhoun did not consider certain eastern tribes to be within the scope of President Monroe's plan for removing Indians to areas west of the Mississippi (see Pet. 16) hardly establishes that the lands of those who were to remain would not be covered by Section 12 of the 1802 Act. Henry Knox's statement in a 1789 letter to President Washington that the states would retain the right of preemption to lands within their borders (see Pet. 15) also has no bearing on the geographic applicability of restraints on alienation of Indian land; as explained above (see pages 14-15, *supra*), the Nonintercourse Acts applied even where a state had the right of preemption. Finally, the article by Joseph Blunt describing the status of Indian tribes during the period of the Articles of Confederation (see Pet. 17) obviously has no bearing on the interpretation of a statute passed pursuant to Congress' greatly enhanced powers over Indian affairs under the Constitution.

[17] The state also relies (Pet. 19-20) on *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358 (1829), for the proposition that all of the provisions of the 1802 Act applied to Indian country west of the boundary described in Section

Nor, contrary to the State's contention (Pet. 21), is the decision below in conflict with this Court's decision in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667-668 (1979). The Court there held that 25 U.S.C. 194, which provides that the burden of proof shall rest on the white person in a property dispute with an Indian where the Indian shows previous possession or ownership, does not apply in a dispute between an Indian tribe and a state. In support of that conclusion, the Court observed that 25 U.S.C. 194 was derived from Section 22 of the 1834 Trade and Intercourse Act. That Act, the Court stated, "was 'intended to apply to the whole Indian country, as defined in the first section'" (442 U.S. at 667, quoting H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834)), an area that the Court concluded did not in 1834 embrace any of the states (442 U.S. at 668).[18] But as we have explained (see page 15, *supra*), Section 29 of the 1834 Act preserved the 1802 Act insofar as it applied to tribes east of the Mississippi. The 1802 Act was not involved in *Wilson*,[19] and the restraint

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1 of that Act. But the specific provision involved in that case expressly authorized the seizure of goods only in "Indian countries" (Act of May 6, 1822, ch. 58, Section 2, 3 Stat. 682), which the Court construed to be land west of the boundary. The discussion relied upon by the State (Pet. 20, quoting 27 U.S. (2 Pet.) at 369) appears to be but a paraphrase of the proviso to Section 1 and was not, at all events, directed to the special restrictions on land transactions. Section 20 of the 1834 Act (4 Stat. 732), which was at issue in *Bates* v. *Clark*, 95 U.S. 204 (1877) (see Pet. 20), likewise was expressly limited to the introduction of alcohol into *Indian country*.

[18] Section 1 of the 1834 Act (4 Stat. 729) defined Indian country as all land west of the Mississippi River, and not within the states of Missouri and Louisiana or the Arkansas Territory, and that part of the United States east of the Mississippi "and not within any state to which the Indian title has not been extinguished."

[19] Section 22 of the 1834 Act (4 Stat. 733; 25 U.S.C. 194), at issue in *Wilson*, was derived from Section 4 of the Act of May 6, 1822, ch. 58, 3 Stat. 683. Although Sections 1 and 2 of the 1822 Act (3 Stat. 682) amended provisions in the 1802 Trade and Intercourse Act, Section 4 of the 1822 Act did not. That Section therefore apparently was an independent enactment, never incor-

on alienation in Section 12 of that Act was not limited to Indian country.

Finally, we agree with the reasoning of the court of appeals (Pet. App. 26a-29a) that Section 19 of the 1802 Act (2 Stat. 145) did not have the effect of exempting Indian land transactions in Connecticut from the requirement of federal approval. Section 19 provided that nothing in the Act "shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states." The phrase "trade or intercourse" refers to ordinary commercial dealings. Practical necessity may have led Congress to except Indians surrounded by non-Indians, and to that extent assimilated among them, from prohibitions on commercial intercourse. But no such necessity required an exception from the requirement of federal approval before the Indians' *lands* could be purchased. And, as the court of appeals explained (Pet. App. 28a-29a), the origins of Section 19 demonstrate that land transactions were not covered by the term "trade or intercourse" or the exception in Section 19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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porated in the 1802 Act, that was simply carried forward in Section 22 of the 1834 Act.

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